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**Attorney for the Plaintiff**

Ernest Bozzi,	: NEW JERSEY SUPERIOR COURT
<i>Plaintiff,</i>	: Hudson County- LAW DIV.
vs.	: DOCKET NO. HUD-L-
	:
Jersey City and Irene McNulty,	: VERIFIED COMPLAINT
<i>Defendants.</i>	:

Plaintiff complains against the Defendants as follows:

1. This is a summary action brought pursuant to the New Jersey Open Public Records ("OPRA"), N.J.S.A. 47:1A-1.1 *et. seq.*

### **COUNT ONE - OPEN PUBLIC RECORDS ACT**

2. Plaintiff Ernest Bozzi sought government records from the Defendants.
3.
  - a. Defendant Jersey City is a New Jersey municipality located in Hudson County that is subject to the Open Public Records Act.
  - b. Defendant Irene McNulty is a Jersey City employee identified as a/the Deputy City Clerk and functioned as the records custodian for the request made by the Plaintiff.
4. Plaintiff is a licensed home improvement contractor seeking to identify pet owners to market, sell and install "invisible fencing" for pet containment.
5. On November 27, 2018, Plaintiff submitted an OPRA request to the Defendants seeking the municipality's latest dog licensing records. Plaintiff consented to the removal or redaction of all information other than the names and addresses of the dog owners, a step he undertook after engaging another municipality over purported privacy concerns. Ex. 1
6. On December 10, 2018, Jersey City, acting Irene McNulty, rejected the request on the basis of Executive Order 21 and GRC rulings relying on it. Ex. 2
7. Over 190 other municipalities Plaintiff had reached out to via OPRA requests for the same information have provided the records he sought.

8. Defendants are in violation of their obligations under OPRA.

**COUNT TWO - (Common Law Access)**

9. The records sought by the Plaintiff are public records pursuant to New Jersey common law.
10. Plaintiff has a legitimate private interest in the records, intending to use same for commercial purposes.
11. Plaintiff's interest in the records is greater than the need of the Defendants' to keep the material from the public.
12. Defendants' conduct violates New Jersey's common law right of access.

WHEREFORE, Plaintiff requests judgement as follows:

- a. Directing the immediate release of the records sought;
- b. Awarding counsel fees and costs of suit;
- c. Awarding other such relief as may be fair, equitable and necessary.

  
DONALD M. DOHERTY, JR., Esq.

**RULE 4:5-1 CERTIFICATION**

The undersigned hereby certifies that the matter in controversy is not the subject of any other pending action or arbitration proceeding. The undersigned does not know of the names of any other parties who should be joined in the action.

  
DONALD M. DOHERTY, JR., Esq.

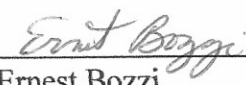
**VERIFICATION**

I, Ernest Bozzi, do hereby verify the following statements on the following bases:

Paragraphs 1- 7 and 10 are made based upon my personal knowledge.

The information contained in the balance of the paragraphs are upon based information and belief, as I am not an attorney and this is my understanding of the law as it has been explained to me.

I certify the foregoing statements made by me are true and that if the statements are willfully false or misleading, I understand that I am subject to punishment.

  
Ernest Bozzi

# OPEN PUBLIC RECORDS ACT REQUEST FORM

## Important Notice

The last page of this form contains important information related to your rights concerning government records. Please read it carefully.

### Requestor Information - Please Print

First Name Ernest MI 6 Last Name Bozzi  
 E-mail Address BozziBuilders@gmail.com  
 Mailing Address [REDACTED]  
 City Eastampton State NJ Zip 08060  
 Telephone [REDACTED] FAX \_\_\_\_\_  
 Preferred Delivery: Pick Up \_\_\_\_\_ US Mail \_\_\_\_\_ On-Site Inspect \_\_\_\_\_ Fax \_\_\_\_\_ E-mail ☒  
 If you are requesting records containing personal information, please circle one: Under penalty of N.J.S.A. 2C:28-3, I certify that I HAVE / ~~HAVE NOT~~ been convicted of any indictable offense under the laws of New Jersey, any other state, or the United States.  
 Signature Ernest Bozzi Date [REDACTED]

### Payment Information

Maximum Authorization Cost \$ \_\_\_\_\_  
 Select Payment Method  
 Cash \_\_\_\_\_ Check \_\_\_\_\_ Money Order \_\_\_\_\_  
 Fees: Letter size pages - \$0.05 per page  
 Legal size pages - \$0.07 per page  
 Other materials (CD, DVD, etc) - actual cost of material  
 Delivery: Delivery / postage fees additional depending upon delivery type.  
 Extras: Special service charge dependent upon request.

Record Request Information: Please be as specific as possible in describing the records being requested. Also, please note that your preferred method of delivery will only be accommodated if the custodian has the technological means and the integrity of the records will not be jeopardized by such method of delivery.

I am requesting copies of your most recent dog license records that you have.

You may redact

...the breed/type of dog

...the name of the dog

...any information about why someone has the dog (comfort animal, handicap assistance, law enforcement or any other reason) if that information is in the record

...any phone numbers whether unlisted or not.

I am trying to get the names and addresses of dog owners for our invisible fence installations (we are a licensed home improvement contractor) and I allow you to remove any information beyond Bernstein v. Allendale.

### AGENCY USE ONLY

Est. Document Cost \_\_\_\_\_  
 Est. Delivery Cost \_\_\_\_\_  
 Est. Extras Cost \_\_\_\_\_  
 Total Est. Cost \_\_\_\_\_  
 Deposit Amount \_\_\_\_\_  
 Estimated Balance \_\_\_\_\_  
 Deposit Date \_\_\_\_\_

### AGENCY USE ONLY

Disposition Notes  
 Custodian: If any part of request cannot be delivered in seven business days, detail reasons here.

In Progress - Open \_\_\_\_\_  
 Denied - Closed \_\_\_\_\_  
 Filled - Closed \_\_\_\_\_  
 Partial - Closed \_\_\_\_\_

### AGENCY USE ONLY

Tracking Information		Final Cost	
Tracking #	_____	Total	_____
Rec'd Date	_____	Deposit	_____
Ready Date	_____	Balance Due	_____
Total Pages	_____	Balance Paid	_____
Records Provided _____			
Custodian Signature _____		Date _____	



Ernest Bozzi

**[Records Center] Open Public Records Request :: R003526-112718**

1 message

Jersey City OPRA Center &lt;jerseycity@mvcusthelp.net&gt;

Mon, Dec 10, 2018 at 10:51 AM

To:

--- Please respond above this line ---



RE: OPEN PUBLIC RECORDS REQUEST of November 27, 2018, Reference # R003526-112718

Ernest Bozzi:

The City received a public information request from you on November 27, 2018. Your request mentioned:

I would like your most recent compiling of dog license records (annual/yearly). You can redact the breed, name of dog, any information about why they have the dog and any phone numbers whether they are unlisted or not. I am only looking for the names and addresses of dog owners for my invisible fence installations (I am a licensed home improvement contractor). Please remove any information beyond the names and addresses for there are no privacy concerns as outlined by the Government Record Council in Bernstein v Allendale.

Pursuant to N.J.S.A. 47:1A-1, Executive Order No. 21 (McGreevey, 2002), Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005) and Knehr v. Township of Franklin, GRC Complaint No. 2012-38 (December, 2012), your request is denied.

N.J.S.A. 47:1A-1 specifically states that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." In this particular instance, the people identified on the dog licensing records would likely be subjected to unsolicited commercial contact. Additionally, "public disclosure of registered dog owners would jeopardize the security of the dog owner, the security of the non-dog owner, the property that the dog may be protecting and the dog itself from burglary, theft and other criminal activity. Many homeowners use their dogs as a means of security and that others have valuable dogs that could be subject to theft." Bernstein v. Borough of Park Ridge, GRC Complaint No. 2005-99 (July 2005). As a result, the responsive documents in the possession of the City are exempt from disclosure pursuant to OPRA.

Sincerely,

Irene McNulty

Deputy City Clerk

Office of City Clerk

Ex 2

**Donald M. Doherty, Jr., Esq.** - Id. # 051981994

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**Attorney for the Plaintiff**

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Ernest Bozzi,	:	NEW JERSEY SUPERIOR COURT
<i>Plaintiff,</i>	:	HUDSON County- LAW DIV.
vs.	:	DOCKET NO. HUD-L- -19
	:	
Jersey City and Irene McNulty,	:	
<i>Defendants.</i>	:	

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**BRIEF IN SUPPORT OF OSC SEEKING RELIEF  
UNDER OPRA and THE COMMON LAW RIGHT OF ACCESS**

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## **PRELIMINARY STATEMENT**

Municipalities are empowered to enact dog licensing schemes pursuant to N.J.S.A. 4:19-15.1

To obtain a dog license, the owner files an application with the municipality and N.J.S.A. 4:19-15.5 authorizes the collection of information:

### **Application for Dog License, Information Requested...**

The application shall state the breed, sex, age, color and markings of the dog for which license and registration are sought, whether it is of a long- or short-haired variety, and whether it has been surgically debarked or silenced; **also the name, street and post-office address of the owner and the person who shall keep or harbor such dog.** The information on the application and the registration number issued for the dog shall be preserved for a period of three years by the clerk or other local official designated to license dogs in the municipality....

The contests over this remarkably unremarkable information are surprising. Alas, none of the existing decisions are binding. *However*, the Court will have the benefit of the logic from three unpublished appellate decision that holds the records are to be disclosed (along with a fourth where the Appellate Division themselves passed the information contained on the dog license in an opinion) as well as a very recent trial court opinion, to contrast with a GRC decision that is premised on a renounced Executive Order. Oh, and the Supreme Court very recently went so far as to bury the ashes of that vanquished Executive Order. And so here we go....

## **FACTS and PROCEDURAL HISTORY**

On November 27, 2018, Ernest Bozzi requested copies of dog license records from various municipalities in Hudson County via an OPRA request form. (Verified Complaint, Ex. 1) The request indicated that a component of his business involved installing a product referred to as “invisible fence”. He sought the most recent dog license records the municipality had available.

Jersey City via its Deputy Clerk, Irene McNulty, denied the request on December 10<sup>th</sup>.

(Verified Complaint, ¶6 & Ex. 2) The denial asserted Executive Order 21 and the GRC rulings Bernstein v. Borough of Park Ridge and Knehr v. Franklin, as justification.

This Order To Show Cause now follows.

## **LEGAL ARGUMENT**

### **I. THIS ACTION SHOULD PROCEED IN A SUMMARY MANNER**

The Open Public Records Act provides “[a] person who is denied access to a government record by the custodian of the record,.....may institute a proceeding to challenge the custodian’s decision by filing an action in Superior Court.” N.J.S.A. 47:1A-6 Plaintiff has elected to proceed in this fashion through the verified complaint. Once instituted, “[a]ny such proceeding shall proceed in a summary or expedited manner.” Id. As OPRA authorizes actions to proceed in a summary manner, the Order To Show Cause should be granted so this matter may proceed in such fashion. R. 4:67-2(a) In fact, it is a “procedural error” to deny a requester the ability to proceed in a summary manner and instead force such cases through litigation processes and a summary judgment application. Courier News v. Hunterdon County Prosecutor’s Office, 358 N.J. Super. 373 (App. Div. 2003)

This action involves a OPRA claims that are neither factually complicated nor procedurally complex. The sole concern is a legal analysis of the accessibility of the dog license records under public access doctrines. Indeed, Defendants do not claim to they do not possess the records sought or deny what they possess are government records, but only assert GRC rulings based on (a now-rescinded) Executive Order 21 bars disclosure.

All claims arise under a document request that was submitted in writing. As Plaintiff’s claims are based on documentary evidence submitted to the Court with the OSC filings, the facts underlying this action cannot reasonably be disputed. Discovery is not anticipated as any factual

issues that may arise can be resolved by evidence submitted through certifications or affidavits by the parties. This is in the purest sense “a matter of law” with minimal - if not completely non-existent - relevant factual disputes. This Order To Show Cause calls upon Court to determine whether records are completely exempt from disclosure. That is a legal determination.

While OPRA specifically allows for summary adjudications, Plaintiff also asserts the ability to access the documents under the common law right of access theory. Again, the adjudication sought from the Court is “legal” and there is no principled reason not to consider the claim under facts presented in their current posture.

Therefore, in light of the foregoing and the Legislature’s directive that OPRA actions proceed in a summary manner, it is requested the Court sign the Order to Show Cause so that this action may proceed in a summary manner and expedited resolution.

## **II. PLAINTIFF IS ENTITLED TO THE RECORDS UNDER THE OPEN PUBLIC RECORDS ACT, N.J.S.A. 47:1A-1. et. seq.**

### **A. Open Public Records Act analysis**

The Open Public Records Act (OPRA) mandates that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State. *Any limitations on the right of access afforded under OPRA shall be construed in favor of the public’s right of access.* Libertarian Party of Cent. New Jersey v. Murphy, 384 N.J. Super. 136, 139 (App. Div. 2006) (citing N.J.S.A. 47:1A-1). The purpose of OPRA is to “to maximize public knowledge about public affairs in order to ensure an informed citizenry.” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). OPRA requires all government records be disclosed upon request except those exempted by statute, legislative resolution, administrative regulation,

executive order, rule of court, judicial decisions, or federal law. N.J.S.A. 47:1A-1-9

Here, the documents sought by Plaintiff are government records within the meaning of OPRA. Under OPRA, a government record:

*.....means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. N.J.S.A.47:1A-1.1.*

Here, there is no doubt the documents requested by Plaintiff are within the records accessible under the statute. The dog licensing records are created and maintained pursuant to N.J.S.A. 4:19-15.1 et. seq. The issue thus turns to whether the records fall into one of the exemptions available under OPRA. **The burden of showing a denial of access was justified rests solely on the Records Custodian.** N.J.S.A. 47:1A-6; Asbury Park Press v. Monmouth Co., 406 N.J. Super. 1, 7 (App. Div. 2009).

**B. The proffered basis for denial is premised upon incorrect government records council opinions.**

That the GRC has previously decided a similar issue, indeed even an identical issue, is not controlling on this Court. Not only does this Court have concurrent jurisdiction with the GRC over to adjudicate denial of access claims made under OPRA, N.J.S.A. 47:1A-5, the statute specifically states that "**a decision of the [GRC] shall not have value as a precedent for any case initiated in the Superior Court....** N.J.S.A. 47:1A-7(e)

Your Honor is unencumbered by any intellectual or *stare decisis* boundaries in the

analysis as a result of what the GRC improperly concluded. There are several critical points the GRC simply “got wrong” when its opinion was first rendered, which have only been further clarified in the intervening time since 2005, by trial courts (unpublished), appellate courts

The GRC issued Bernstein after Bernstein decision, simply re-affirming its own mistakes. The Bernstein decisions are (and were when they issued, as will be demonstrated) out of step with privacy jurisprudence. Several problems are at the core of the chain of errors. So why are the GRC decisions incorrect?....

**i. The GRC’s reliance on Executive Order 21 was erroneous.**

OPRA authorizes the denial of access to records not only mentioned in the statute itself but also by "Executive Order of the Governor." N.J.S.A. 47:1A-9(a); see also, Mason v. City of Hoboken, 196 N.J. 51, 65 (2008) The GRC’s Bernstein decisions (and thus Knehr) all trace back to ¶ 3 of Executive Order 21 to define how broadly to construe “the reasonable expectation of privacy” contained in the preamble of that same Executive Order and N.J.S.A. 47:1A-1. That paragraph defined the “reasonable expectation of privacy” to include:

3. *In order to effectuate the legislative directive that a public governmental agency has the responsibility and the obligation to safeguard from public access a citizen's personal information with which it has been entrusted, an individual's home address and home telephone number, as well as his or her social security number, shall not be disclosed by a public agency at any level of government to anyone other than a person duly authorized by this State or the United States, except as otherwise provided by law, when essential to the performance of official duties, or when authorized by a person in interest. Moreover, no public agency shall disclose the resumes, applications for employment or other information concerning job applicants while a recruitment search is ongoing, and thereafter in the case of unsuccessful candidates.*  
Executive Order 21, 34 N.J.R. 2487 (2002)

Executive Order 21 issued on July 8, 2002, the day after OPRA took effect. As OPRA was intended to **increase** public access, the provisions of Executive Order 21 that exempted all

documents with an address caused an immediate uproar. OPRA made documents more accessible than the prior Right-To-Know law and then Executive Order 21 took the restrictions backwards more than a century. *See generally, Lum v. McCarty*, 39 N.J.L. 287 (E.&A. 1877); Barber v. West Jersey Title & Guaranty, 53 N.J. Eq. 158 (E. & A. 1895) (allowing public access to deeds and records, which contain, *inter alia*, addresses) Following this extensive (nee, near abusive) public backlash, a month later Governor McGreevey then **rescinded** ¶ 3 of Executive Order 21 when he issued Executive Order 26, 34 N.J.R. 3043(b) (2002) on August 13, 2002.

Executive Order 26 also rescinded ¶ 2 of Executive Order 21. And in Slaughter v. GRC, 413 N.J. Super. 544 (App. Div. 2010), the appellate division dispatched ¶ 4 of Executive Order 21. ***ALL substantive provisions of Executive Order 21 have now been rescinded or nullified!!***

The **entire premise** undergirding the GRC decision in Bernstein was a nullity from the beginning. The GRC incorrectly defined the privacy analysis from a starting point recognized to not be the proper public policy more than 2 years earlier!!

Knehr is even worse - to the extent such could be possible - because it not only relies upon Bernstein, but it tries to draw distinctions between commercial and non-commercial users, a point the not only not found in the statute, but countered by its provisions that do not require disclosure of a reason (or even identity) when requesting records AND affronts the statute's express language that the records are available to any person. N.J.S.A. 47:1A-5(a) Not only did Burnett allow commercial use of the records, but it came out 3 years *earlier* than Knehr. Nothing could demonstrate the GRC's desperation to cling to "Bernstein-logic", than the attempt to distinguish the unreported appellate AC-SPCA decision (attached to Counsel Cert. as Ex 1 and discussed below in section "D") which ordered the records be released and its own Bernstein decisions, which of course do not. It *claimed* that the SPCA wanted the records primarily for

enforcement reasons. **This is not true.** The AC-SPCA also used the records to create a solicitation list (opinion at pg. 3) that the master SPCA organization then sold to businesses. (Counsel Cert. Ex. 3, D’Alessandro Certification) Contrary to the GRC musings, there was no distinction on which purpose was “primary”, not that it even makes a difference.<sup>1</sup> OPRA was never intended to be a market-maker by giving records to charities to sell that people could not get themselves. The GRC opinion are not only logically flawed, they ignore the law laid out by the courts and make no logical sense.

**ii. The privacy interest in public records was never as broad as the GRC interpretation in Bernstein.**

The GRC analysis regarding the privacy interest in public records was simultaneously both truncated and over-expansive. The GRC decision in Bernstein v. Allendale incorrectly determined that Doe v. Poritz, 142 N.J. 1, 82 (1995) stood for the premise that records connecting a name and address created an insurmountable privacy interest. **That is not what Doe v. Poritz stood for at all!**

Doe was a myriad of challenges to the Megan’s Law enactment, which had two relevant parts - the Registration law, allowing the government to maintain and disclose the list when requested and the Notification law, which was active dissemination by the government of the information. Contrary to the GRC’s analysis of the case, the Supreme Court took no issue at all with the release of a criminal’s history connected with the name and address, Id. at 79, and specifically held there was no “privacy interest” in people learning that someone was on the

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<sup>1</sup> As the Court will notice, I was counsel to the AC-SPCA to obtain the records AND I was D’Alessandro’s counsel (he was this Plaintiff’s foreman) when he did not want to spend the money the SPCA was demanding for the mailing list and sought to create his own list through OPRA requests. Counsel Cert. Ex. 1 & 3

registered list of sex offenders. Id. at 82<sup>2</sup> The “privacy interest” that existed was recognized **only** with regard to the-affirmative-steps-initiated-by-the-government-to-disseminate-information inherent in the Notification Law. Id. at 84 And even then, active notification was upheld (with required pre-dissemination judicial approval). Id. 91 There were concerns that the “invasive conduct” being directed at the offenders was harassment and vigilantism, and yet that was not enough to exalt the privacy interest over public availability of the names and addresses.

**Notably, neither the Bernstein case nor this one involve affirmative government dissemination of information like the Notification Law, but rather provision of information requested by citizens like the Registration Law.** It is simply defies all common sense that the *very real* threat of vigilante justice against a sex offender does not result in a violation of privacy, but a direct mail postcard from a contractor regarding a dog fence would. The GRC’s Bernstein decisions were simply a bad ruling based upon a misunderstanding of the case. The GRC treated *dicta* about general privacy standards more expansively than the Court treated the (very significant) privacy claims that were made in Doe.

The logic proffered by the GRC for not disclosing names and addresses makes even less sense when one considers that only 6 days before the Doe v. Portiz decision (issued July 25, 1995), the Supreme Court specifically ruled in Higg-A-Rella, v. Essex, 141 N.J. 35 (1995) (July 19, 1995) that the names and addresses in public records are not subject to privacy interest **and it did so even after the government abandoned the argument**, obviously intending to keep the argument from recurring.

*Before this Court, defendants, represented by the Attorney General, have rescinded that argument [privacy vested in names and addresses]. We find*

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<sup>2</sup> In fact, the State Police maintain a website to access that information:  
<http://www.njsp.org/sex-offender-registry/index.shtml>

*that, given the very public nature of the information in the lists, defendants properly chose not to pursue the confidentiality/privacy claim. The State has no interest in confidentiality: The lists contain simple, non-evaluative data that have historically been available to the public, and that do not give rise to expectations of privacy. Id. at 49*

No court has ever uttered another word to the contrary, but the GRC continues to self-perpetuate its own mistakes by ignoring this maxim from Higg-A-Rella and instead relying on its own line of Bernstein cases derived from Executive Order 21. It is inflicting a grave disservice to the citizens of New Jersey to allow these decisions to self-perpetuate incorrect law.

Further - ***and even worse for the Defendants' position*** - the New Jersey Supreme Court recently decided Brennan v. Bergen County Prosecutor's Office, 233 N.J. 330 (2018) and ***again*** tackled the interplay of addresses in routine government records and privacy as government bodies continued to attempt to utilize the expanded scope of privacy regarding home addresses found in Executive Order 21. Important of note is that the Court completely agrees with the analysis (***and significance***) of Executive Order 21's replacement with Executive Order 26. The Court not only recounted the demise of Executive Order 21, but pointed out that....

...As the above examples reveal, the Legislature has chosen to prevent disclosure of home addresses in select situations. Aside from those particular exemptions, however, OPRA does not contain a broad-based exception for the disclosure of names and home addresses that appear in government records.

If OPRA does not exclude disclosure by its terms, an **exceptional** privacy interest must be apparent before the court even begins a privacy analysis under Burnett v. Bergen, 198 N.J. 408 (2009). Also, the Supreme Court went even further, pointing out that even the Privacy Commission appointed after the enactment of Executive Order 26 allowed for the release of home addresses under OPRA and that the OPRA statute only allows a limited number of instances where addresses may be withheld.

Notably, under this new Supreme Court case the only way Your Honor *even* reaches applying Doe/Burnett factors is to expressly find that a person *could* have an objectively reasonable expectation of privacy in dog ownership. **That is not even the privacy interest the Defendants argued by relying on the GRC ruling - the GRC position is that there is a privacy interest in avoiding the unsolicited contact by mail from Mr. Bozzi's business efforts.**

Moreover, *only* if Your Honor were to draw a conclusion that people have an *objectively* reasonable expectation of personal privacy to keep the world from knowing that they have a dog - noisy, walked outside, routinely exposed to the public - only then are the Burnett (or Doe) factors as even reached to be analyzed. No court has ever found a privacy interest in dog ownership.

**C. The privacy interest in public records must be defined by nature of the information involved and the realistic level of potential harm.**

For a host of reasons, Doe's concern are largely irrelevant when factually measured against the records sought here. The Supreme Court was not dealing with, nor commenting upon, what are routine public records containing names and addresses and mundane household information. Doe was dealing with a new law, addressing then-unaddressed criminal and social problem - what to do with or about sex offenders. Wrapped in that morass is a host of constitutional law issues like the rights of the accused, double jeopardy, due process, etc. A small business compiling a mailing list implicates no such concerns. The case setting the proper framework for more routine records about more pedestrian issues (and relied upon by the unreported appellate decisions on dog license records) is Burnett v. Bergen, 198 N.J. 408

(2009).<sup>3</sup>

Burnett draws the privacy line when there is “personal information”, *the type of which leads to the potential for real and significant harm if disclosed*. The Supreme Court did not have one iota of concern over releasing the names and addresses contained in the deed and mortgage records - none, zero, zip. The Court’s sole concern was that there were social security numbers written on many documents that posed a real and significant risk to people if released and included on a searchable electronic database. Id. at 430-31 It categorized the nature of the harm inflicted if someone obtained the social security numbers as “ruinous” and made the direct correlation between the release of social security numbers to the very-real-and-documented problem of identity theft. Id. at 432 Weighing the significance of the privacy interest embodied in the information beyond just the name and address and weighing it with the potential for significant harm, the Court held that the Bergen County Clerk did not have to release the records *en masse* for electronic duplication ***unless the requester paid for the custodian to review the documents for redactions***. There was no concern at all over names and addresses being released.

In Burnett, the release of the information for commercial purposes did not matter at all. The plaintiffs were seeking to create a private searchable database for the title industry AND for the sale of mailing lists, etc... Nor did it matter in Higg-A-Rella. And the latter case fully demonstrates the futility of the Defendants’ position. Bozzi or anyone even claiming to be interested in creating a mailing list can obtain the records under the common law. The interest in protecting the “name and address” information is so slight that there is virtually no barrier to

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<sup>3</sup> Sadly, the GRC ***never*** addresses Burnett other than to salt the name into its opinions that rely on the Bernstein rulings. It has never issued a substantive analysis of Burnett and instead just repeatedly declares “Doe supports Bernstein”, a point never upheld by any court touching the issue (*see* section “D”, below).

having a “legitimate private interest” and being able to get them, rendering OPRA and the common substantively similar for these types of non-evaluative data-type records.

**D. The unreported appellate and trial division cases demonstrate the proper analytical structure.**

It is understood that unreported appellate decisions are not precedential on this Court. R. 1:36-3 However, they can aid in what the proper analysis structure should entail.

Thrice the appellate division has analyzed these same records in unpublished cases and thrice has reached the same conclusion: there is no significant privacy interest at stake and the records must be released. Another appellate case gave the information away without any concern for privacy. And a trial judge, quite sick of the having this dog license fight repeatedly in her courtroom, also wrote.

The first case was the AC-SPCA v. Absecon. (Counsel Cert., Ex. 1) The local Society for the Prevention of Cruelty to Animals submitted OPRA requests to every municipality in Atlantic County. The AC-SPCA readily admitted that one of the reasons it sought the dog licenses was to create a list to solicit donations. The Appellate Panel in AC-SPCA then rejected all of the arguments the undersigned made about OPRA and privacy. Instead they analyzed privacy and records access in light of Burnett v. Bergen which had issued between the trial and appellate phases of the case. The appellate panel found dog-license information was not as potentially “ruinous” as the social security numbers at issue in Burnett and broke down the privacy analysis as follows:

- Canine ownership is not a significant “personal identifier”. AC-SPCA at 11
- Canine ownership information does not have the potential for “ruinous” consequences like the disclosure of a social security number Id. at. 12

- Canine ownership is simple, non-evaluative data to which **no** expectation of privacy attaches. *Id.*
- Safeguards for the information were not necessary because it is not linked to personal identifier information that would cause harm. *Id.* at 12-13
- The “legitimate private interest” of using the list for solicitation<sup>4</sup> was a sufficient to overcome the extremely low (-to-non-existent) privacy expectation. *Id.* at 13
- Unlike the social security numbers in *Burnett*, no law exists to limit or exempt any of the information from disclosure. *Id.*

The *Bernstein v. Allendale* GRC ruling makes other assertions beyond privacy that just plan fail the logic test. “Dog theft” is theoretically possible, but how often does it happen? And if it does, would not the person who requested “dog license records” be suspect number one? Further, Plaintiff allowed for all information but names and addresses to be redacted, so if someone wanted to steal a specific type of dog, anything Bozzi gets would not help them. And one would think criminals are not likely to obtain key elements of the *modus operandi* that could be so easily traced back to them. If the Defendants wish to engage this contest, they must come forward with proof of the dog-theft epidemic gripping their town.

Further, telling Bozzi that a citizen has a dog is no more or less an imposition on personal safety than releasing information regarding senior citizens, disabled veterans and surviving spouses, but tax records do that. *Higg-A-Rella v. Essex*, 141 N.J. at 42 Tax records also contain information taken directly off of deeds and thus indicate property titled “Ms. X, single woman”.

Rounding out the “justifications”, just because you have a dog does not mean you safe and just because you do not have one does not mean you are not. Thinking that criminals are

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<sup>4</sup> Not that it makes a difference, but the AC-SPCA solicits by phone and mail and it is not constrained by the federal or State do-not-call requirements for telemarketing.

Bozzi can only send direct mail brochures because he specifically allowed for all information to be redacted except names and address.

going to reverse engineer which houses do not have dogs by requesting copies of dog licenses records attributes an awful lot of planning and foresight to the mind of the meth-addled and crack-addicted.

Every public record can be used to harm or facilitate theft; that does not mean they are not released. It certainly does not stop the police departments and municipal courts from releasing violations information so lawyers can solicit you for traffic violation defense. Cars are more often stolen than dogs afterall. And knowing when you must be at municipal court can more easily lead to the conclusion that your home is empty, no?

As the AC-SPCA v. Absecon decision is not “reported”, apparently municipalities still resisted its disclosure mandate. This resulted in a second unreported dog license case, Bolkin v. Fair Lawn, A-02205-12T4. (Counsel Cert. Ex. 2) The appellate panel there completely endorsed the trial court’s decision to release the records. It analyzed the “potential for unsolicited contact” that these Defendants have mistaken as a grave privacy violation.....

*"[t]he disclosure, while potentially causing . . . possible nuisance due to unwanted solicitation, does not include extremely personal or private information that would . . . discourage an individual from owning, and properly licensing, a dog or cat." pg. 3*

The panel went on to compliment that while it was also not constrained to follow the AC-SPCA case, it found “its reasoning persuasive.” pg. 9

The third case was D’Alessandro v. Robbinsville, A-4181-16. In that case Plaintiff D’Alessandro sought dog license records to solicit for invisible fence installations. D’Alessandro was even employed by this Plaintiff and undertook the OPRA efforts to avoid paying the SPCA for the dog license records it had compiled through OPRA and was offering for sale. (Counsel Cert. Ex. 3) He prevailed at the trial court level and subsequently defeated both a

motion for reconsideration and a stay pending appeal. Robbinsville appealed. The appellate division too rejected the stay, and even undertook the rare step of crafting a short opinion why it was rejecting the stay, culminating with “*Robbinsville Township and Michelle Seigfried [the Clerk] have not shown....that they have a likelihood of success on the merits.*”

And further still is another unreported appellate case touching on dog license records, McGuire v. Waterford, A-3196-05. (Counsel Cert., Ex. 4) There the requester made an anonymous request for dog licenses held by a specific person and the appellate decision even uses the name and address of the dog license holder in its opinion, underscoring that releasing same is not a privacy matter.

Appellate cases dealing with the same records, for the same solicitation-oriented purposes, have ordered them disclosed under OPRA. Your Honor must do the same here.

### **III. PLAINTIFF IS ENTITLED TO THE RECORDS UNDER THE COMMON LAW RIGHT OF ACCESS**

Another theory that affords access to public records is the common law right of access. The existence of an exemption in OPRA does not limit “in any way” a record requestor’s right of access under the common law. OPRA expressly states, “[n]othing contained in [OPRA] shall be construed as affecting in any way the common law right of access to any record,...”

N.J.S.A. 47:1A-8 There is a similar OPRA provision at N.J.S.A. 47:1A-1. See also, Bergen Co. Imp. Auth. v. North Jersey Media Group, Inc., 370 N.J.Super. 504, 521 (App. Div. 2004)

Therefore even if the documents are exempt under OPRA, the common law right to access must be considered.

In order to access government records under the common law, a citizen must meet three requirements.

- (1) [T]he records must be common-law public documents;
- (2) the person seeking access must establish an interest in the subject matter of the material; and
- (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure. (internal citations omitted).  
Keddie v. Rutgers, 148 N.J. 36, 50, (1997).

As regards the common law right of access, “in furtherance of good government the right of interested citizens and taxpayers to inspect public records should be broadly recognized.” Taxpayers Ass'n of Cape May v. Cape May, 2 N.J. Super. 27, 31, (App. Div. 1949). The common law makes a much broader class of documents available than the statutory laws did/do, but on a qualified basis. Higg-A-Rella, 141 N.J. at 46 (discussing former Right-To-Know law and common law interplay; see also, Daily Journal v. Police Dep't of Vineland, 351 N.J. Super. 110, 122 (App. Div. 2002), making the identical observation regarding OPRA .)

While the dog license records are not exempt under OPRA, there is not even a debate to be entertained under the common law right of access.

**A. The records are “public records”.**

Under the common law, public records available for inspection “*include any records made by public officers in the exercise of their functions. As such, they include almost every document recorded, generated, or produced by public officials, whether or not required by law to be made, maintained, or kept on file*” (citations omitted). Daily Journal, 351 N.J. Super. at 122

The records sought in the present case satisfy that broad definition. Dog license records are not only mandated to be kept by law, even the information contained in them is set by law. N.J.S.A. 4:19-15.5. Defendants did not claim the records were not public records; they asserted only an exemption from disclosure.

**B. Plaintiff has an identifiable interest in the records.**

The interest necessary to determine standing to obtain copies of public records may be either " a wholesome public interest or a legitimate private interest." Loigman v. Kimmelman, 102 N.J. 98, 112 (1986) Plaintiff's use of the material for commercial solicitation is a "legitimate private interest" and he is required to demonstrate nothing more. In fact, his interest is the same as the plaintiff in Higg-A-Rella. 141 N.J. at 42 "[I]f the governmental need in confidentiality is slight or nonexistent," the record requestor need show only good faith and citizen or taxpayer status. Loigman, 102 N.J. at 104-05

**C. Defendants have no legitimate interest weighing against disclosing the records.**

This prong of the test requires the Court to impart an analysis of the data that would be disclosed. Names, addresses, veteran status, and senior citizen status are elements of "simple, non-evaluative data that do not give rise to expectations of privacy." Higg-A-Rella, 141 at 49 The information on a dog license is names, addresses and information about the dog (Plaintiff allowed all information about the dog to be redacted; all that he learns is that a dog exists.)

That analysis is encompasses the following criteria:

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;

- (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
- (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 303(2009) quoting Loigman, 102 N.J. at 113.

Considerations 3, 5 and 6 are not even remotely connected to this case. Criteria 1, discouraging disclosure to the government, is not relevant because the dog license information is required to be provided; it is not a discretionary decision by the dog owner like whistle-blowing. Criteria 2, reliance by the information provider that their identity would remain confidential, is resolved against Defendants. People must license the animals, just as they must register their cars or put their deeds on record. No rationale person believes the world-at-large is not going to know they have a dog - most are taken outside for walks, car rides to the veterinarian, etc. Any rationale person would be far more offended in the world having access to the mortgage on their home and that information is public record - and routinely gathered by companies to solicit new mortgage business. Criteria 4 is also clearly resolved in favor of disclosure - as discussed above, it is bare factual data, devoid of any critical analysis component.

“Public records” sought by someone with a “legitimate private interest” must be released when there is no significant privacy objection. Dog license records are not even close to the boundaries of privacy that would give this Court pause.

#### **IV. REASONABLE COUNSEL FEES MUST BE AWARDED**

If the Court orders Defendants to produce the documents at issue, the Court must also

find that Plaintiff is the prevailing party. Under OPRA's fees-shifting provisions, Plaintiff must be awarded a reasonable attorneys' fee and costs. N.J.S.A. 47:1A-6. Mason v. Hoboken, 196 N.J. 51, 79 (2008) concluded that the catalyst theory also applies mandate fees be awarded under the common law right of access.

### **CONCLUSION**

OPRA was intended to broaden public access. Comprised of executive branch appointees, most of whom are not even lawyers, the GRC has repeatedly maintained a crabbed, if not cramped, view of records access. This was particularly true is the 2005-era time frame when the Bernstein decisions were promulgated. In Paff v. N.J. DOL, Bd. of Rev., 379 N.J. Super. 346, 353 (App. Div. 2005) the GRC was taken to task for shirking its adjudicatory responsibilities for rendering decisions based upon certifications from a custodian that the records were confidential without any probing or substantive proofs. This same fault is exposed in the Bernstein v. Allendale decision by....

- the conclusory reliance on the Chief of Police asserting that releasing the information would jeopardize dog owners, non-owner and the dogs themselves,
- ignoring the written law that dog licensing was mandatory so as to facilitate the contradictory conclusion that disclosing the information would discourage citizens from providing the information,
- the completely incorrect reading and subsequent burden analysis made under Doe, and
- the reliance on an Executive Order 21, even though it was vacated years earlier.

The Supreme Court itself has pointed out the impropriety of expanding OPRA's very limited bases for withholding home addresses on privacy grounds. And appellate and trial courts throughout the State have repeatedly ordered these records released - not only for others, but for this very Plaintiff.

While Defendants may try to circumvent OPRA by pointing to the GRC decisions, they

simply have nowhere to turn when confronted with the common law right of access claim. No coherent argument can draw a distinction between addresses from the tax rolls and addresses from the dog license list.

Respectfully submitted,

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